

Supreme Court, U. S.
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In the Supreme Court of the United States

October TERM, 1976

NO. **76-527**

Edward H. Lowe, et al

Petitioner

VS.

City of Jackson, Mississippi

Respondent

PETITION FOR WRIT OF CERTIORARI TO

The Supreme Court of Mississippi

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In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

Edward H. Lowe, et al

Petitioner

VS.

City of Jackson, Mississippi

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI**

Petitioner, **Edward H. Lowe**, et al, prays that a writ of certiorari issued to review the judgment and opinion of the Supreme Court of Mississippi, which opinion was handed down, July 27, 1976 and the petition for rehearing was acted upon and denied on September 7, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi is reported in 336 So 2d 490 and it appears at Appendix A

in this petition. The petition for rehearing was denied September 7, 1976, and appears in the appendix at page A25. The order denying the petition for rehearing appears in the appendix commencing at page A26. The opinion of the Chancery Court of the First Judicial District of Hinds County Mississippi is shown in the Appendix at pages A12 through A24. The motion to Dismiss on the grounds of the unconstitutionality of the Statutes and the Order overruling the motion are shown in the Appendix at pages A7 through A11.

JURISDICTION

The Opinion and Affirmation of the Supreme Court of Mississippi was rendered July 27, 1976 and the Petition for Rehearing was denied September 7, 1976. The Petition for Rehearing and the order overruling the Motion for rehearing are shown in the Appendix of this brief at Pages A25 and A26.

The Petition for Certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of the Court is invoked under 29 U.S.C. 1257(3). Sections 21-1-27, 21-1-13 and 21-1-45 of the Mississippi Code 1972 are shown at Pages 5 through 9 in the Appendix.

QUESTIONS PRESENTED

The question presented in this petition is:

1. Whether Section 21-1-27 of the Mississippi Code 1972 violates the Equal Protection Clause of the Four-

teenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourteenth Amendment of the Constitution of the United States.

2. Sections 21-1-27, 21-1-13 and 21-1-45 of the Mississippi Code 1972.

STATEMENT OF THE CASE

The City of Jackson, Mississippi, on August 27, 1974, enacted an ordinance extending and enlarging the corporate limits of the city. The area proposed to be annexed consists of 52.13 square miles, or 33,363.20 acres of land. The ordinance was published and;

On September 13, 1974, the city filed its Petition in the Chancery Court of the First Judicial District of Hinds County, Mississippi, for ratification, approval and confirmation of the ordinance. The ordinance in general terms described the proposed improvements to be made in the territory proposed for annexation, the manner and extent of such improvements, and the approximate time within which such improvements are to be made. It stated that the city shall make following improvements in the territory proposed for annexation within a reasonable time:

Improve existing streets and drainage.

The ordinance further set out a statement of the municipal or public services which the city proposed to render in the annexed territory, to-wit: Police and fire protection, sanitation, pest control and maintenance of existing streets as well as their right to vote in city elections.

The Court fixed the date for hearing the petition on October 28, 1974.

An estimated 26,000 people live in the territory sought for annexation. Approximately 1,800 signed, objections were filed.

After hearing and overruling Appellants' Motion for Dismissal on the grounds of the unconstitutionality of Section 21-1-27 Mississippi Code of 1972, and other motions, the Court set a hearing on the merits began on November 25, 1974. The testimony was concluded on February 20, 1975. This matter was taken under advisement to afford the Court time within which to study the voluminous exhibits introduced in evidence, and to review the testimony adduced and on April 25, 1975, rendering its decision and Decree allowing the annexation but deleting certain territory.

Appellants appealed and sought reversal of this case in the Supreme Court of Mississippi.

By opinion dated July 27, 1976, the Supreme Court of Mississippi affirmed the Chancellor's Actions.

The Supreme Court held that the annexation statute was not invalid on the ground that it did not allow persons in the proposed area of annexation to express

their approval or disapproval and that there was substantial evidence to support the determination and that the annexation was reasonable and required by public convenience and necessity.

The Court further held that the Mississippi statute granting power to an incorporated municipality to annex territory did not violate equal protection clause because the inhabitants of the area to be annexed are not permitted to express their approval or disapproval by voting.

Further the Court in making the determination construed Sections 21-1-27, 21-1-13 and 21-1-45 of the Mississippi Code of 1972 and determined the Statutes to be Constitutional.

REASONS FOR GRANTING THE WRIT

The Decision of the Supreme Court of Mississippi directly conflicts with the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

The extension of corporate boundaries of a municipality is allowed by legislative enactment, being Section 21-1-27 Mississippi Code of 1972. That Section is as follows:

21-1-27. Passing of ordinance.

The limits and boundaries of existing cities, towns and villages shall remain as now established until altered in the manner hereinafter provided. When any municipality shall desire to enlarge or contract the boundaries thereof

by adding thereto adjacent unincorporated territory or excluding therefrom any part of the incorporated territory of such municipality, the governing authorities of such municipality shall pass an ordinance defining with certainty the territory proposed to be included in or excluded from the corporate limits, and also defining the entire boundary as changed. In the event the municipality desires to enlarge such boundaries, such ordinance shall in general terms describe the proposed improvements to be made in the annexed territory, the manner and extent of such improvements, and the approximate time within which such improvements are to be made; such ordinance shall also contain a statement of the municipal or public services which such municipality proposes to render in such annexed territory. In the event the municipality shall desire to contract its boundaries, such ordinance shall contain a statement showing whereby the public convenience and necessity would be served thereby.

Section 21-1-13 of the Mississippi Code of 1972 requires a petition signed by two-thirds of qualified electors residing in a territory to be incorporated into a municipality. That Section is as follows:

21-1-13. Preparing and filing of petition. Whenever the inhabitants of any unincorporated territory shall desire to incorporate

such territory as a city or town, they shall prepare a petition and file same in the chancery court of the county in which such territory is located or, if the territory is located in more than one county, the chancery court of either county. Said petition shall meet the following requirements:

- (1) it shall describe accurately the metes and bounds of the territory proposed to be incorporated and there shall be attached to such petition a map or plat of the boundaries of the proposed municipality;
- (2) it shall set forth the corporate name which is desired;
- (3) it shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be incorporated;
- (4) it shall set forth the number of inhabitants of such territory;
- (5) it shall set forth the assessed valuation of the real property in such territory according to the latest available assessments thereof;
- (6) it shall state the aims of the petitioners in seeking said incorporation, and shall set forth the municipal and public services which said municipal corporation proposes to render and the reasons why the public convenience and

necessity would be served by the creation of such municipal corporation;

(7) it shall contain a statement of the names of the persons the petitioners desire appointed as officers of such municipality; and

(8) it shall be sworn to by one or more of the petitioners. When such a petition shall be filed, it shall be docketed as are other suits and causes in the chancery courts of this state.

Section 21-1-45 provides for a vote by petition of two-thirds of the qualified electors to be included or excluded from certain territory adjacent to or residing in the corporate limits of a municipality. That Section is as follows:

21-1-45. Electors' option to be included in or excluded from existing municipality-preparing and filing of petition.

The qualified electors of any territory contiguous to and adjoining any existing municipality and the qualified electors of any territory which is a part of an existing municipality, may be included in or excluded from such municipality, as the case may be, in the manner hereinafter provided. Whenever the inhabitants of any incorporated territory adjacent to any municipality shall desire to be included therein, and whenever the inhabitants of any territory which is a part of an existing municipality shall desire to be excluded therefrom,

they shall prepare a petition and file same in the chancery court of the county in which such municipality is located, which said petition shall be signed by at least two-thirds of the qualified electors residing in the territory proposed to be included in or excluded from such municipality. Said petition shall describe accurately the metes and bounds of the territory proposed to be included in or excluded from such municipality, shall set forth the reasons why the public convenience and necessity would be served by such territory being included in or excluded from such municipality, as the case may be, and shall be sworn to by one or more of the petitioners. In all cases, there shall be attached to such petition a plat of the municipal boundaries as same will exist in the event the territory in question is included in or excluded from such municipality. No territory may be so excluded from a municipality within two years from the time that such territory was incorporated into such municipality, and no territory may be so excluded if it would wholly separate any territory not so excluded from the remainder of the municipality. No petition for the inclusion or exclusion of any territory under this section shall be filed within two years from the date of any adverse determination of any proceedings originated hereinafter under this chapter for the inclusion or exclusion of the same territory.

Section 21-1-27 of the Mississippi Code 1972 was the basis for the city's annexation ordinance. This Section denies the right to the qualified electors to vote by petition or otherwise and therefore denies Equal Protection as guaranteed by the Constitution.

The traditional standard of review under the equal protection clause of the Fourteenth Amendment is to examine whether the objective the state seeks to further by classification is legitimate and, if so, whether the classification bears a rational relation to the objective. E.g., McGowan v. Maryland, 366 U.S. 420, 425 (1961). In cases involving the abridgement or deprivation of rights classified as "fundamental", the Supreme Court has adopted a more stringent standard of review: the compelling state interest standard. Succinctly stated, the compelling state interest standard is "whether the exclusion is necessary to promote a compelling state need". Thus, the Supreme Court has held to be "fundamental" the constitutional right to vote, Kramer V. Union Free School District, 395 U.S. 620 (1969). The deprivation of this fundamental right must be justified by a compelling state interest.

In a free society and in this Republican form of government no right is more fundamental than the right to vote and to participate in the political process including annexation and/or incorporation of a new municipality. In 1886, the Supreme Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Yick Wo. v. Hopkins, 118 U.S. 356, 379 (1886). In Reynolds Sims, 377 U.S. 533, 561-2 (1963) the Supreme Court stated:

"Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be fully and meticulously scrutinized".

The Supreme Court has clearly and unequivocally enunciated the principle that a denial of the fundamental right to vote by a state must be subjected to the compelling state interest test.

If a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to other, the Court must determine whether the exclusions are necessary to promote a compelling state interest. Kramer v. Union Free School District, 395 U.S. 621, 627 (1969).

In the case decided the same day as Kramer, the Supreme Court held that a Louisiana statute limiting the franchise in a bond election to property tax holders violated the equal protection clause of the Fourteenth Amendment, applying the Kramer compelling interest equal protection standard of review. Cipriano v. City of Houma, 395 U.S. 701, 704 (1969).

In Evans v. Cormán, 398 U.S. 419, 422 (1970); the court stated:

"Before that right (to vote) can be restricted, the purpose of the restriction and the assertly overriding interest served by it must meet close constitutional scrutiny."

And in City of Phoenix v. Koldziejski, 399 U.S. 204, 209 (1970) in holding that state constitutional and statutory provisions excluding non-property owners from voting in elections for the approval of the issuance of general obligation bonds violated the equal protection clause of the Fourteenth Amendment, the Court applied test of whether to justify such an exclusion there was a "overriding interest. . . which the State is entitled to recognize."

This is also the teachings of Dunn v. Blumstein, 405 U.S. 330 (1972).

Section 21-1-27 of the Mississippi Code of 1972 excluded from the right to vote all persons otherwise qualified to vote who live in territory sought to be annexed by a municipality. Under the foregoing authorities, therefore, to be constitutional, this exclusion must be justified by a compelling state interest.

Petitioners submit that the State of Mississippi has no compelling state interest in denying these qualified voters the right to vote. Petitioners assert first that the burden of proof is upon the State to show that there is such a compelling state interest; second, that the statutory provisions of Section 21-1-27 amply demonstrates that there is no such compelling state interest.

The state has by this Section created an uncon-

stitutional classification as to their qualified voters and residents living in the territory sought to be annexed by denying them the same right to vote by petition granted to incorporators or residents voting by petition to be included or excluded from an existing municipality. This Court has addressed itself to simular classification which classification was less onerous in the case of Reynolds v. Sims 377 U.S. 533.

"To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged—the wieght of a citizen's vote cannot be made to depend on where he lives.

Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in a city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of government of the people, by the people, and for the people. The Equal Protection Clause demands no less than substantially equal state legislative representation

for all citizens, of all places as well as of all races."

The Annexation Proceedings should not have been considered and construed by the Court since it was based upon an unconstitutional statute.

In the recent case of City of Eastlake v. Forest City Enterprises, Inc. No. 74-1563 decided June 21, 1976. This Court upheld the right to vote on a zoning ordinance in Ohio. In that case the Court said:

"A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters an exercise by the voters of their traditional right to override the views of their elected representatives as to what serves the public interest." Southern Alameda Spanish Speaking Organization v. City of Union City, California, 424 F. 291, 294 (CA9 1970).

This Mississippi Statute makes second class citizens out of citizens who live outside the Corporate boundaries and subjects of annexation. The cases are too numerous to cite that hold that a citizen of the United States must be a first class citizen with full rights to vote as all other classes. To deny the rights to vote to these citizens would deny to them Equal Protection under the Constitution of this United States and for these reasons Petitioners pray that this Honorable Court will so hold.

CONCLUSION

For these reasons, a writ of Certiorari should service to review the Judgment and Opinion of the Supreme Court of Mississippi.

Respectfully submitted,

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APPENDIX

A1

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,316

EDWARD H. LOWE, ET AL.

V.

CITY OF JACKSON, MISSISSIPPI

**BEFORE PATTERSON, ROBERTSON AND
BROOM, JUSTICE, FOR THE COURT:**

Annexation of 52.13 square miles in six areas was desired by the City of Jackson (Jackson herein) which adopted an ordinance on August 27, 1974, defining the subject lands. Miss. Code Ann. Section 21-1-27 (1972). Jackson then petitioned the Chancery Court of the First Judicial District of Hinds County for a decree under Mississippi Code Annotated Section 21-1-29 (1972), ratifying, approving, and confirming the proposed enlargement of its municipal boundaries. After hearing voluminous and conflicting testimony, the chancellor decreed ratification and confirmation of the ordinance as to about forty square miles. We affirm.

The appellants (objectors) argue: (1) Mississippi Code Annotated Section 21-1-27, *supra*, upon which the decree appealed from is based, violates the "equal protection clause of the 14th Amendment of the Constitution of the United States," and (2) the chancellor erroneously held that the "annexation was reasonable and was required by public convenience and necessity."

I.

As to the constitutionality of Section 21-1-27, *supra*, the appellants say that it denies to the qualified electors the right to vote by petition or otherwise, and accordingly denies them the equal protection guaranteed by the United States Constitution. The constitutionality of the section (Sec. 3374-10 in our 1942 Code) was upheld in *Bridges v. City of Biloxi*, 253 Miss. 812, 178 So. 2d 683 (1965), but there the argument was that the property of the objectors would be subject to taxation to pay general obligation bonds issued by Biloxi prior to passage of the annexation ordinance.

When the Mississippi Legislature enacted Section 21-1-27 granting unto municipalities the power of annexation, the lawmakers specifically legislated so as to permit such annexation of land without any requirement that the inhabitants of the subject area give prior consent or in any way express their approval. The United States Supreme Court held in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177-79, 28 S. Ct. 40, 46-47, 52 L. Ed. 151 (1907), that municipalities, as creatures of the state, may exercise such powers "as may be entrusted to them." It further held in *Hunter* that the territorial area of a municipality may be expanded "with or without the consent of the citizens, or even against their protest." The right or power of a municipality in this state acting under the legislative mandate of Section 21-1-27 to extend its boundaries without the consent of those living within the path of the extension was also litigated and upheld in *Texas Gas Transmission Corporation v. City of Greenville*, 242 So. 2d 686, 689 (Miss. 1971). See 2 E. McQuillen, *The*

Law of Municipal Corporations, Section 7.16 (3d ed. 1966); *City of Biloxi, Mississippi v. Cawley*, 332 So. 2d 749 (Miss. 1976); and *City of Jackson, Mississippi v. The Town of Flowood, Mississippi*, 331 So. 2d 909 (Miss. 1976).

No showing was made by appellants that Jackson was by means of annexation gerrymandering its voting precincts to discriminate against any particular class of objectors. No evidence indicated that any litigant was the subject or object of discrimination. Appellants assert that the annexation would be unconstitutional because the residents would be subject to the control of municipal officers in whose election they did not vote. However, there is no substance to this assertion. No cited case has ever required an immediate election. Such is not the law and we cannot so hold as long as Section 21-1-27 remains in its present form — only the legislature can alter its terms. Interesting is the fact that there was a time when the issue of annexation was one triable by jury, but that requirement was changed by the legislature. *Kraetzer Cured Lbr. Co. v. Town of Moorhead*, 118 Miss. 736, 80 So. 4 (1918). Many citizens, like the chancellor in *City of Biloxi v. Cawley*, *supra*, are convinced "that the people in the territory . . . should have the right to vote on the question of their being taken into the municipality." However, as noted by him, "such an election" is not provided by present statutes, and the Constitution does not permit courts to judicially legislate and thereby "change the statutes" created by the legislative branch of our government.

Appellants point to the fact that in cases involving areas proposed to be incorporated, qualified voter in-

habitants are allowed to "vote by Petition" on the proposed incorporation (Miss. Code Ann. Sec. 21-1-13 (1972)). Similarly, Mississippi Code Annotated Section 21-1-45 (1972) allows voting by petition where citizens voluntarily seek either annexation to or exclusion from an area already incorporated. On this basis appellants say they are denied equal protection of the law because they are not permitted to vote on the annexation proposition initiated by Jackson, an existing incorporated city. There is no merit to such an argument because there is "a fundamental difference of some magnitude" between incorporation of an unincorporated area on the one hand and the extension of corporate boundaries on the other. *Hamilton v. Incorporation of Petal*, 291 So. 2d 190 (Miss. 1974). The legislature, aware of the distinction between the two legal processes (incorporation and annexation), saw fit to legislate as reflected in the statutes referred to above, and we are unable to say that enactment of the statutes resulted in any arbitrary or irrational classification.

II.

Burdened with showing that the annexation was reasonable and required by public convenience and necessity pursuant to Code Section 21-1-27, *supra*, Jackson presented testimony from a large number of witnesses. These witnesses included experts whose testimony related to the following criteria set forth in *Texas Gas Transmission Corp. v. City of Greenville*, *supra*, at 689: (1) the city's need for expansion; (2) whether the area to be annexed is reasonably within the path of such expansion; (3) the potential health hazard from sewage and

water disposal; and (4) the city's financial ability to make improvements and furnish municipal services as promised.

Testimony showed that Jackson had a sewage treatment plant with adequate capacity to take care of the needs of the people in the subject area. Other testimony was that presently in the territory, health problems were posed by the sewage and waste water facilities which could be better controlled if annexation were allowed. Also heard by the chancellor was testimony showing a present need for police service in the area affected which could better be provided by annexation. It was shown that better fire protection and resulting savings in fire insurance premiums could be furnished if the area were annexed. Other evidence demonstrated a need for better street lighting in the area of proposed annexation that could be provided within a reasonable time after annexation.

Additional testimony was to the effect that if the territory were annexed Jackson could provide better recreational facilities and better garbage pickup service to the inhabitants. In summary, there was testimony in support of each of the five pertinent criteria according to *Texas Gas Transmission Corp.*, *supra*, and to the effect that Jackson had the financial ability to make the improvements and furnish all municipal services as promised.

To the contrary, appellants presented testimony, including that of experts, tending to indicate that under the applicable criteria annexation was improper. Much of their testimony concerned the fact that a considerable

portion of the land sought to be annexed was open or swamp land which Jackson had no reason to annex. As pointed out by us in *Dodd v. City of Jackson*, 238 Miss. 372, 118 So. 2d 319 (1960), where it can be reasonably anticipated that the parcel of land will become a part of the city within a reasonable time, such property may be taken in so as to develop it properly and wisely with reference to the securing of water, the development of streets and the collection and disposal of sewage and waste "rather than to let the area develop in a harum-scarum manner."

After hearing the conflicting expert opinions and radically divergent testimony, the chancellor (empowered by the legislature to act as he did) accepted that offered on behalf of Jackson. In our judgment, the evidence in behalf of Jackson was substantial and formed a sufficient basis to support the decree appealed from. Supported by substantial evidence and not manifestly wrong or against the weight of the evidence, the chancellor's decree must be affirmed.

AFFIRMED.

**GILLESPIE, C.J., PATTERSON, P.J., INZER,
P.J., and SMITH, ROBERTSON, SUGG,
WALKER and LEE, JJ., CONCUR.**

**IN THE CHANCERY COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI**

NO. 94254

**IN THE MATTER OF THE EXTENSION
OF THE BOUNDARIES OF THE
CITY OF JACKSON, MISSISSIPPI**

MOTION TO DISMISS

Comes now Edward H. Lowe, Juanita Taylor, Selby Crenshaw, Harold Ferguson, Janie Parish, Barbara Thornton, Fred Hoerner, Frank Stewart, Ernest Weaver, George Clements, Herbert Tullos, Henry Williams, Hollis Grice, Aaron Williams, John Rivers, J. K. Webb, Doug McCurley, Charles Shirley, W. L. Graves and Edward Martin Peusch, individually and for and on behalf of others joined herein by Petition, and without waiver of any other defenses by and through their attorney, and files this their Motion to Dismiss and in support thereof would show unto the Court the following, to-wit:

I.

That Section 21-1-27 Mississippi Code of 1972 Annotated, violated the Fourteenth Amendment of the Constitution of the United States as well as being in violation of the Constitution of the State of Mississippi, and is therefore unconstitutional.

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2.

That said violates said Constitution in that it allows Taxation of Movants without representation and is therefore invalid and unconstitutional.

3.

That the actions of the Petitioners are unconstitutional and in violation of said Constitution in that said Ordinance deprives them of their property without due process of law.

4.

That said Ordinance of the City of Jackson violated the Constitution of the State of Mississippi as well as the Constitution of the United States of America in that it provides no notice or opportunity to be heard prior to passage and is, therefore, unconstitutional and invalid.

5.

That said Ordinance is in violation of the Constitution of the State of Mississippi and the United States of America in that it subjects them to Ordinances, taxes and jurisdiction without their approval or consent and violated Article IX and X of the Constitution of the United States of America and is therefore, invalid.

6.

That said Ordinance and Petition are invalid in

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that it will subject movants to irregular and unequal taxation in violation of Section 112 of the Constitution of the State of Mississippi. That said movants will be subject to unequal assessments in violation of the Constitution and is, therefore, invalid.

7.

Other reasons to be shown at there hearing hereof.

WHEREFORE, PREMISES CONSIDERED, Movants pray that upon a hearing hereof the Court will dismiss the Petition.

Respectfully submitted,

EDWARD H. LOWE, ET AL

BY: _____

JOHN ARTHUR EAVES,
Attorney for Movants

CERTIFICATE

I, the undersigned attorney of record for Movants hereby certify that I verily believe the above and foregoing to be well taken and that the same is not filed for delay but should be sustained.'

JOHN ARTHUR EAVES,
Attorney for Movants

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CERTIFICATE

I, John Arthur Eaves, Attorney for Movants, certify that I have this day mailed, postage prepaid, to the Honorable L. Arnold Pyle and Honorable John E. Stone, Attorney of record for the City of Jackson, a true and correct copy of the above and foregoing Motion at their usual post office address.

This the 28th day of October, 1974.

JOHN ARTHUR EAVES

A11

**IN THE CHANCERY COURT OF THE FIRST
JUDICIAL DISTRICT OF HINDS COUNTY,
MISSISSIPPI**

**IN THE MATTER OF THE EXTENSION
OF THE BOUNDARIES OF THE
CITY OF JACKSON, MISSISSIPPI**

NO. 94,254

ORDER OVERRULING MOTION TO DISMISS

This cause came on to be heard upon the Motion of Edward H. Lowe, et al., by their attorney, John Arthur Eaves, to dismiss the Petition herein on numerous grounds as set forth in paragraphs one through seven of said Motion, the first of which the movants allege that Section 21-1-27 Mississippi Code of 1972 Annotated, violated the Fourteenth Amendment of the Constitution of the United States as well as being in violation of the Constitution of the State of Mississippi, etc., and the Court having heard and considered argument of counsel, and being fully advised in the premises, is of the opinion that said Motion should be and the same is hereby denied.

Ordered, adjudged and decreed this the 13th day of November, 1974.

CHANCELLOR

**IN THE CHANCERY COURT
OF THE
FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

NO. 94,254

IN THE MATTER OF THE EXTENSION
OF THE BOUNDARIES OF THE
CITY OF JACKSON, MISSISSIPPI

THE CITY OF JACKSON, MISSISSIPPI
A MUNICIPAL CORPORATION PETITIONER

W. K. GOFF, EDWARD M. PEUSCH,
EDWARD H. LOWE, THE BAPTIST
CHILDREN'S VILLAGE, ET AL. OBJECTORS

OPINION OF THE COURT

At a regular meeting of the Council of the City of Jackson, Mississippi, held on August 27, 1974, an ordinance was duly enacted extending and enlarging the corporate limits of the City. The area proposed to be annexed consists of 52.13 square miles, or 33,363.20 acres of land. The said ordinance was published according to law.

On September 13, 1974, the City filed its petition in this Court for ratification, approval and confirmation of the ordinance. A certified copy of the ordinance, together with the requisite map, was attached to the petition. The ordinance defines with certainty the territory proposed to be included in the corporate limits, and also

defines the entire boundary as changed.

In accord with the terms and provisions of Sec. 21-1-27, Miss. Code, 1972, the ordinance in general terms describes the proposed improvements to be made in the territory proposed for annexation, the manner and extent of such improvements, and the approximate time within which such improvements are to be made. It is stated that the City shall make the following improvements in the territory proposed for annexation within a reasonable time, not to exceed five (5) years from the effective date of the ordinance, unless delayed by war or military preparedness:

“(a) Improve existing streets and drainage.

“(b) Install water lines, water service, sewage disposal lines, sewage treatment facilities and street lighting, where necessary and economically feasible.

“(c) Said services shall be furnished in the same manner and to the same extent as such services are being furnished to the present citizens of the municipality.”

The ordinance further sets out a statement of the municipal or public services which the City proposes to render in the annexed territory, to-wit:

“(a) Police protection.

“(b) Fire protection.

“(c) Garbage removal.

approve, ratify and confirm the ordinance if found to be reasonable, (2) to modify the proposed enlargement or contraction by decreasing the territory to be included or excluded, or (3) to deny in to the proposed enlargement or contraction if found to be unreasonable. *Lippian v. Ros*, 253 Miss. 325, 175 So.2d 138 (1965).

A thorough study of the maps, charts and other exhibits received in evidence, in connection with the testimony of knowledgeable and believable witnesses, shows the following:

(1) Sections 1 and 2 of T4N, R1W, together with Sections 29, 32, 33, 34 and 35 of T5N, R1W, located in the southwestern part of the territory sought for annexation, are for the most part unimproved. Section 2 contains the clubhouse and other facilities of Brookwood Country Club, which can in no sense be considered an "urbanized" area in need of municipal control for residential, commercial or industrial use and purposes. In recent years certain parts of this area have attained some degree of growth, particularly along McCluer Road, Old Miss. Highway 18 (Raymond Road), Forest Hill Road, and Maddox Road. But the great majority of this land is either wild and unproductive or utilized for cropland and pastureland. In weighing the proposition of municipal taxation against the mere possibility of future city growth into this area at some unforeseen and unpredictable time, the Court is of the opinion that annexation of parts of this area (set out with certainty hereinafter) would be unreasonable.

(2) Sections 9, 10, 15 and 16 of T5N, R1W, lying

in the western portion of the territory sought for annexation, consist mostly of unimproved, rural land. There is presently some new construction in the proximity of the intersection of Maddox Road and New Miss. Highway 18, and along New Miss. Highway 18 West of the Maddox Road intersection. Timberlawn Elementary School is located in the S 1/2 of the S 1/2 of said Section 16, but this section is traversed by only one thoroughfare and contains the Hinds County garbage dump. The Court is of the opinion that annexation of parts of this area would be unreasonable.

(3) Section 7 of T6N, R1E, and those parts of Sections 10 and 15 of T6N, R1W, situated in the area sought for annexation, which sections are in the northern portion of said area, are predominantly rural and unimproved. Most apparently this land has not been affected by the "growth pattern" of the City, and due to its location and lack of roadways it will be a number of years before urbanization and its attendant need for municipal control will become a reality. The Court is of the opinion that it would be unreasonable to annex this territory.

(4) The testimony shows that Section 22 of T6N, R1W, in the northern part of the area sought for annexation, lying adjacent to the corporate limits of the City of Clinton, contains 49 homes, 9 trailers (non-permanent dwellings), 2 barns, 1 church, 3 shops, and 1 store. The thoroughfares in this section consist of the Old Vicksburg Road, Magnolia Road, and Hobby Farms Road. If house trailers are counted, the curtilage of each habitation, in relation to the acreage in the entire section, would average out to 11.03 acres. Mr. Don Irvin, the Director of the

Jackson City Planning Board, testified that 6 or 8 dwellings to the acre would be considered a "low density" situation. The annexation of this section would be unreasonable.

(5) The Baptist Children's Village is situated in a portion of the N 1/2 of Section 23, T6N, R1W, west of Flag Chapel Road. This facility is in the northern portion of the area sought for annexation, and consists of some 149 areas. This is a charitable nonprofit corporation, being an official agency of the Mississippi Baptist Convention. Its purpose is for the training, nurture, religious upbringing, and the physical and mental care of children who have been abandoned or neglected, or who are the unfortunate products of broken homes. This facility consists of 23 one-story brick buildings in campus configuration. It has its own sewage lagoon, constructed with its own funds, designed for a population in excess of that which it presently has, and regularly inspected by officers of the Environmental Protection Agency. It takes care of its own garbage removal daily; garbage is stored in sanitary metal containers and hauled away by a private firm four times weekly. It owns and maintains its fire protection equipment, and has adequate water mains with a plug for each building. The buildings are spaced at such distances that a fire in one would not affect another. It maintains its own campus security. It has about 50 mercury vapor lights along its streets. It maintains its own streets. It has its own recreational facilities. It purchases its water from the City, but otherwise is in no way dependent upon the City. In an average year it takes in and cares for the needs of about 325 children.

On an average, there are about 150 children, at any given time, of school age in the Baptist Children's Village. These children go to school in the Clinton Municipal Separate School District. Baptist Children's Village owns and maintains its own vehicles to transport its children to and from school. The school authorities in Clinton have, over the years, given special attention to the problems of these children.

Expert witnesses described these children as having a "built-in feeling of fear", as being "vulnerable, susceptible and frightened", as having "an insecure feeling — — psychological problems arising from the common thread of abandonment by their parents", and as having "problems of instability, with disciplinary problems greater than those of average children."

Dr. Gerald Pascal, a qualified clinical psychologist employed by Baptist Children's Village, testified that these children have a different set of standards from those of normal children. He said they were not well-adjusted, and are sometimes rebellious — — and that some of them are "even suicidal."

The testimony showed that these children, on an average, are scholastically "on a much lower level" than normal children. Between 25% to 40% of them require special education due to their unstable family background. Dr. Virgil Belue, Superintendent of the Clinton Municipal Separate School District, testified that special education classes have been designed for the Clinton schools with Baptist Children's Village pupils specially in mind.

Dr. Pascal testified that, in his opinion, these children should continue to attend school together, especially due to their need to "lean on one another for support." He said that, in his opinion, being together in school provides stability, and means a lot to these children. He said that he is of the opinion that the removal of these children from the Clinton schools would be disruptive, disturbing and detrimental to them.

The Jackson Municipal Separate School District maintains excellent schools, counselling and facilities. But, according to the testimony of John D. Watson, Jr., the Director of Pupil Accounting for the Jackson schools, it is not uncommon that a family with four children would have to send each to a separate school.

In view of the above, this Court is of the opinion that annexation of the Baptist Children's Village land would be unreasonable.

The territory sought for enlargement by the City will be modified by deleting therefrom the following described land lying and being in the First Judicial District of Hinds County, Mississippi, to-wit:

In Township 4 North, Range 1 West:

All that part of Section 1 lying southwest of the southwesterly right-of-way line of Forest Hill Road.

All that part of Section 2 lying west of the westerly right-of-way line of Forest Hill Road.

In Township 5 North, Range 1 West:

All of Section 9.

All that part of Section 10 lying west of the westerly right-of-way line of Maddox Road.

All that part of the N 1/2 of Section 15 lying west of the westerly right-of-way line of Maddox Road.

The N 1/2 and the N 1/2 of the S 1/2 of Section 16.

Section 29, LESS AND EXCEPT that portion of said section lying north of the southerly right-of-way line of Old Miss. Highway 18 (Raymond Road) and east of the north-south half-section line of said section.

All of Section 32.

Section 33, LESS AND EXCEPT that portion of said section lying north of the southerly right-of-way line of McCluer Road.

The S 1/2 of Section 34.

All that portion of the S 1/2 of Section 35 lying west of the westerly right-of-way line of Forest Hill Road.

In Township 6 North, Range 1 East:

Section 7, LESS AND EXCEPT all that por-

tion of said section lying south of the northerly right-of-way line of Forest Avenue Extension.

In Township 6 North, Range 1 West:

All of that part of Section 10 lying southeast of the southeasterly right-of-way line of the proposed Natchez Trace Parkway, being all of said Section 10 lying within the proposed annexation area.

All of that part of Section 15 lying southeast of the southeasterly right-of-way line of the proposed Natchez Trace Parkway, being all of said Section 15 lying within the proposed annexation area.

All of Section 22.

All of that part of the N 1/2 of Section 23 lying west of the westerly right-of-way line of Flag Chapel Road and south of the southerly right-of-way line of Northside Drive.

At this point it should be noted that the evidence shows that the City of Jackson is vested with title to approximately 900 acres of land in Sections 4 and 5, T4N, R1E, and in Sections 32 and 33, T5N, R1E, which land is in the southeast corner of the territory sought for annexation. The land in this area is virtually uninhabitable due to the fact that it is in an extremely low marsh, but the evidence shows that the intention of the City is to construct and maintain a park facility (wildlife preserve) in this area.

During the hearing, the City adduced evidence as to its financial ability and administrative ability to afford the territory within the expansion area with the improvements and services set out in the ordinance. The City Council, being a legislative body, found that the expansion area with the improvements and services set out in the ordinance. The City Council, being a legislative body, found that the expansion herein sought is in, and required by, the public convenience and necessity. See *Ritchie v. City of Brookhaven*, 217 Miss. 860, 65 So.2d 436 (1953). The record amply reflects, and the Court finds, that the City met the burden of proof of public convenience and necessity for the expansion.

The Court finds that the enlargement herein sought, as modified by the decrease in territory as hereinabove specified set out, is reasonable; that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time; and that the improvements set out in the ordinance will be completed within a reasonable time, not to exceed five (5) years from the effective date of the ordinance, unless delayed by war or military preparedness.

A decree will be drawn and submitted approving, ratifying and confirming the proposed enlargement as modified by the decrease in territory hereinabove specifically set out. Said decree shall contain a description of the territory annexed, as so modified. A map or plat of the territory so approved, ratified and confirmed for annexation, taking into account the modification herein

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made by the Court, will be filed among the papers in this cause.

CHANCELLOR

A25

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,316

EDWARD H. LOWE, ET AL
APPELLANT

VS.

CITY OF JACKSON, MISSISSIPPI
APPELLEE

PETITION FOR REHEARING

Comes now the Appellant and respectfully suggest that this Court erred in its affirmance of the order of the Court below. Appellant, with respect, suggest that the Court's decision in this cause is erroneous in that it is based upon Hunter Vs. City of Pittsburgh, 207 U.S. 161, 177-79, 28 S. CT 40, 46-47, 52 L. Ed 151 (1907).

Respectfully submitted,

JOHN ARTHUR EAVES

101 Bankers Trust Plaza Building
Jackson, Mississippi 39201

Attorney for Appellant

CERTIFICATE

I, John Arthur Eaves, the Attorney for the Appellants, do hereby certify that I have this day hand-delivered a true and correct copy of the foregoing Petition for Rehearing to Hon. L. Arnold Pyle, Attorney for Appellee.

THIS _____ day of August, 1976.

JOHN ARTHUR EAVES

IN THE SUPREME COURT OF MISSISSIPPI

TUESDAY, SEPTEMBER 7, 1976, COURT SITTING:

EDWARD H. LOWE, ET AL

#49,316 VS

CITY OF JACKSON

This cause this day came on to be heard on Petition for Rehearing filed herein and this Court having sufficiently examined and considered the same En Banc and being of the opinion that the same should be denied doth order that said Petition be and the same is hereby denied.

MINUTE BOOK "BR" PAGE 585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-527

EDWARD H. LOWE, ET AL,

Petitioners,

versus

CITY OF JACKSON, MISSISSIPPI,

Respondent.

**On Petition for Writ of Certiorari
to the Mississippi Supreme Court**

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-527

EDWARD H. LOWE, ET AL,
Petitioners,

versus

CITY OF JACKSON, MISSISSIPPI,
Respondent.

On Petition for Writ of Certiorari to the
Mississippi Supreme Court

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

TO THE HONORABLE, THE CHIEF JUSTICE OF
THE UNITED STATES AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:

OPINIONS BELOW

The Opinion of the Chancery Court of the First
Judicial District of Hinds County, Mississippi is set
out in the Petitioners' Appendix A beginning at page

A-12. The Opinion of the Supreme Court of the State of Mississippi, reported at 336 So.2d 490, is set out in the Petitioners' Appendix A at page A-1. The decision turned upon the lower Court's determination, based upon the massive amount of evidence adduced at the lengthy hearing of this cause, that the annexation, as modified by the Court, was reasonable. This case has been thoroughly considered by two courts, both of which found in favor of Respondent.

JURISDICTION

Petitioners attempt to invoke the jurisdiction of this Court under 29 U.S.C. 1257 (3), however, the Respondent would point out that there is no such statute. Respondent would assume that since the Petitioners are seeking a writ of certiorari, that Petitioners' petition should reflect 28 U.S.C. 1257 (3) as the statute under which they attempt to invoke the jurisdiction of this Court.

QUESTIONS PRESENTED

I.

Whether the criteria are present which are concomitant with United States Supreme Court review by certiorari.

A. Whether there is any special or important reason for the review of the decision of the Mississippi Supreme Court.

B. Whether there is a substantial federal question.

STATUTES INVOLVED

Sections 21-1-27, 21-1-29, 21-1-31, 21-1-33, 21-1-35, 21-1-37, 21-1-39, and 21-1-41 Miss. Code Ann. (1972), which statutes govern the extension or contraction of corporate boundaries in Mississippi.

STATEMENT OF THE CASE

The decision of the Supreme Court of the State of Mississippi, which the Petitioners request that this Court review, is a decision involving the routine municipal annexation of adjacent unincorporated territory to the City of Jackson, Mississippi. The Respondent, City of Jackson, Mississippi, adopted an ordinance on August 27, 1974, extending and enlarging the boundaries of the City of Jackson. Subsequent to the adoption of said ordinance, the City of Jackson filed its petition for ratification, approval and confirmation of the ordinance as required by Section 21-1-29 Miss. Code Ann. (1972)¹, attaching to said petition a

¹ Section 21-1-29 Miss. Code Ann. (1972) reads:

When any such ordinance shall be passed by the municipal authorities, such municipal authorities shall file a petition in the chancery court of the county in which such municipality is located; however, when a municipality wishes to annex or extend its boundaries across and into an adjoining county such municipal authorities shall file a petition in the chancery court of the county in which such territory is located. The petition shall recite the fact of the adoption of such ordinance and shall pray that the enlargement or contraction of the municipal boundaries, as the case may be, shall be ratified, approved and confirmed by the court. There shall be attached to such petition, as exhibits thereto, a certified copy of the ordinance adopted by the municipal authorities and a map or plat of the municipal boundaries as they will exist in event such enlargement or contraction becomes effective.

copy of the ordinance, Exhibit "A" thereto, and a map, Exhibit "B" thereto, showing the City of Jackson and the area proposed for annexation. Pursuant to Section 21-1-31 Miss. Code Ann. (1972)², notice of the hearing on the City's petition was given so that all parties either affected or aggrieved by the proposed annexation could appear at the hearing and present their objections to the annexation.

The lower Court hearing, held pursuant to Section 21-1-33 Miss. Code Ann. (1972), consumed 17 weeks, 16 volumes of testimony, exhibits and pleadings and some 57 witnesses. The Chancery Court of the First Judicial District of Hinds County, Mississippi, Division II thereof, thereafter entered its opinion and final decree ratifying, approving and confirming the ordinance, as modified by the Court, enlarging the boundaries of the City of Jackson (Appendix A to petition, pages A-12 through A-24).

From that final decree, the Petitioners, some of the

² Section 21-1-31 Miss. Code Ann. (1972) reads:

Upon the filing of such petition and upon application therefor by the petitioner, the chancellor shall fix a date certain, either in term time or in vacation, when a hearing on said petition will be held, and notice thereof shall be given in the same manner and for the same length of time as is provided in section 21-1-15 with regard to the creation of municipal corporations, and all parties interested in, affected by, or being aggrieved by said proposed enlargement or contraction shall have the right to appear at such hearing and present their objection to such proposed enlargement or contraction. However, in all cases of the enlargement of municipalities where any of the territory proposed to be incorporated is located within three miles of another existing municipality, then such other existing municipality shall be made a party defendant to said petition and shall be served with process in the manner provided by law, which process shall be served at least thirty days prior to the date set for the hearing.

Objectors in the Chancery Court, appealed to the Supreme Court of the State of Mississippi. The decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi hereinabove referred to was affirmed by the Supreme Court of the State of Mississippi on July 27, 1976 (*Edward H. Lowe, et al v. City of Jackson, Mississippi*, 336 So.2d 490 (Miss. 1976), Appendix A to petition, pages A-1 through A-6). The judgment of the Supreme Court of Mississippi found that the statute under constitutional attack, Section 21-1-27 Miss. Code Ann. (1972) was in fact constitutional and did not deny the Objectors, appellants therein, equal protection as guaranteed by the United States Constitution. In addition, the Court stated that the lower Court, after hearing the conflicting testimony and evidence, had accepted that offered on behalf of the City of Jackson, and in the judgment of the Supreme Court of Mississippi, the evidence offered on behalf of the City of Jackson was substantial and formed a sufficient basis to support the decree of the lower Court. The Supreme Court concluded in its opinion that the decree of the trial Court was supported by substantial evidence, was not manifestly wrong or against the weight of said evidence, and, therefore, the Chancellor's decree had to be affirmed.

REASONS FOR DENYING THE WRIT

I.

None Of The Criteria Are Present Which Are Concomitant With United States Supreme Court Review By Certiorari.

The Respondent strongly urges that the present case is not a proper case for review by this Court on a writ

of certiorari. This case has no commanding constitutional issues and is merely a local matter involving questions of state law and procedure.

A. There Is No Special And Important Reason For Review Of The Mississippi Supreme Court's Decision

Rule 19(1) of the Rules of the Supreme Court of the United States specifically states that a review on writ of certiorari "is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor." The Mississippi Supreme Court has thoroughly reviewed the record in this case and has determined that the trial court's decision ratifying and approving the annexation proceedings should be affirmed. The only error alleged by Petitioners, which error was presented to the courts below and which has been passed upon by the Court before, is one which involves purely state procedure and practice and does not raise a substantial federal question. The Mississippi municipal annexation statutes (§21-1-27 *et seq.* Miss. Code Ann. (1972)) allow anyone who is aggrieved or adversely affected by the annexation proceedings the right to file a protest with the Chancery Court of proper jurisdiction and fully state his objections and offer evidence in support thereof to the Court. If he should be unsuccessful there, he has the right of appeal with supersedeas to the Mississippi State Supreme Court

by posting a bond in the amount of \$500.00. §§ 21-1-21³ and 21-1-37⁴ Miss. Code Ann. (1972).

B. Petitioners' Petition Fails To State A Substantial Federal Question

The Petitioners' allegation that the Mississippi statute for enlarging municipal boundaries is unconstitutional does not present a substantial federal question. The position of the Petitioners in this matter, succinctly stated, is that they have been denied equal protection of the law as guaranteed by the Constitution of the United States since Section 21-1-27 Miss. Code Ann. (1972) (set out in full at pages 5 and 6 of the petition) does not afford them the right to vote by petition or otherwise on a proposed annexation. The

3 Section 21-1-21 Miss. Code Ann. (1972) reads:

Any person interested in or aggrieved by the decree of the chancellor, and who was a party to the proceedings in the chancery court, may prosecute an appeal therefrom to the supreme court within ten days from the date of such decree by furnishing an appeal bond in the sum of five hundred dollars with two good and sufficient sureties, conditioned to pay all costs of the appeal in event the decree is affirmed. Such appeal bond shall be subject to the approval of the chancery clerk and shall operate as a supersedeas. If the decree of the chancellor be affirmed by the supreme court, then such decree shall go into effect after the passage of ten days from the date of the final judgment thereon, and the party or parties prosecuting such appeal and the sureties on their appeal bond shall be adjudged to pay all costs of such appeal.

4 Section 21-1-37 Miss. Code Ann. (1972) reads:

If the municipality or any other interested person who was a party to the proceedings in the chancery court be aggrieved by the decree of the chancellor, then such municipality or other person may prosecute an appeal therefrom within the time and in the manner and with like effect as is provided in section 21-1-21 in the case of appeals from the decree of the chancellor with regard to the creation of a municipal corporation.

Petitioners' allegation that they have been denied due process rights guaranteed by the Fourteenth Amendment to the United States Constitution does not present to this Court a substantial federal question as required by Rule 19 (1) (a) of the Rules of the Supreme Court of the United States.

Almost 70 years ago, this Court, in the case of *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) ruled against the arguments which are now set forth by the Petitioners. The Respondent strongly urges that *Hunter* is dispositive of the issues raised by the Petitioners. In *Hunter*, the Court was faced with a Pennsylvania act authorizing the consolidation of two cities upon a majority vote of the electors in the combined cities. A majority vote of the total votes cast in the two cities of Allegheny and Pittsburgh were in favor of a consolidation, but a majority of the votes cast in the smaller city of Allegheny opposed it. The citizens of Allegheny objected, contending that the Pennsylvania act unconstitutionally deprived them of their property without due process of law. The Supreme Court, however, rejected these objections and affirmed the State Court, stating:

... Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them for the purpose of executing these powers properly and efficiently. They usually are given the power to acquire, hold and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the

territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any laws conferring governmental powers or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All of this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all of these respects, the state is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the federal Constitution which protects them from these injurious consequences. The power is in the state and those

who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

(207 U.S. 161, at 179).

Hunter v. City of Pittsburgh made it clear that municipalities such as the City of Jackson are creatures of the legislature of the State and as such are entirely subject to legislative will. The Mississippi legislature has enumerated in Sections 21-1-27, *et seq.* Miss. Code Ann. (1972) the manner and procedure in which a municipality such as the City of Jackson may enlarge its boundaries by way of annexation. If a municipality desires to enlarge its boundaries, it must proceed under the dictates of Sections 21-1-27, *et seq.* The Mississippi legislature has, therefore, by the enactment of this Section, made it unnecessary for a municipality to obtain the consent of the qualified electors either in the municipality wishing to annex adjacent territory or in the area proposed for annexation. The granting to a municipality acting by and through its governing elective legislative body, of the power to annex land under specified conditions, even without consent of the property owners in the area proposed for annexation, as we have here, has been reviewed by courts on numerous occasions and upheld in a long line of cases. 2E McQuillen, *Law of Municipal Corporations*, § 7.16 (3rd rev. ed. 1966). In addition, it is equally well-settled that the power to annex may be exercised over inhabitants of a proposed annexation area, not only without their consent, but even over their objection and protest. 2E McQuillen, *supra*, § 7.16 and cases cited therein.

In the case of *Bridges v. City of Biloxi, Mississippi*, Cause Number 923, filed in the October, 1965 term of this Court and reported at 383 U.S. 574 (1966), the questions concerning this particular statute, Section 21-1-27 Miss. Code Ann. (1972) (formerly § 3375-10 Miss. Code Ann. (1942)) were presented to and considered by this Court. The appellant in *Bridges* listed in her jurisdictional statement, *inter alia*, as a question presented to the Court, the following:

I. Does the failure of a state statute to permit the inhabitants and/or the qualified electors of an area sought to be annexed to vote upon the question of annexation offend the equal protection clause of the Fourteenth Amendment?

This is precisely the question which the Petitioners in the present cause seek to present to this Court. In dismissing the appeal in *Bridges*, this Court stated:

The motion to dismiss is granted and the appeal is *dismissed for want of a substantial federal question*.

(383 U.S. 574) (emphasis added).

Even if this Court had not considered this question prior to the filing of the petition herein, the question which Petitioners seek to review has also been presented and passed upon in the case of *Citizens Committee to Oppose Annexation v. City of Lynchburg, Virginia*, 400 F.Supp. 68 (W.D.Va. 1975), *aff'd in part, vacated in part, remanded*, 528 F.2d 816

(4th Cir. 1975), *injunction denied*, 96 S.Ct. 766 (1976). In that case, the plaintiffs brought an action seeking an injunction enjoining the enforcement of a state court decree ordering the annexation of portions of two counties in Virginia to the City of Lynchburg, Virginia. The plaintiffs also sought to enjoin the holding of elections pursuant to the court decree and requested an award of money damages. The United States District Court for the Western District of Virginia held, *inter alia*, that the Virginia annexation statute was not unconstitutional for any of the reasons alleged. With regard to the constitutionality of the Virginia statute, the Court stated at page 75:

Plaintiffs' next claim is somewhat vague, but appears to be that citizens residing in the annexed area have a constitutional right to vote on annexation and the failure of the Virginia annexation statute to require their approval renders that statute unconstitutional. While citing the "privileges and immunities" and "due process" clauses, plaintiffs seem to place their principal reliance on the "equal protection" clause of the Fourteenth Amendment. In considering this claim, it must be remembered that Virginia, unlike a number of states, provides for a judicial procedure for the approval of annexations. Va. Code Ann. § 15.1-1032, *et seq.* (1973). Approval of annexations in Virginia is subject to a judicial determination that the specified statutory standards are satisfied and is not determined by the electoral process. Thus, plaintiffs' reliance on the Fourteenth Amendment apportionment cases is once

more misplaced, for while it is perhaps arguable that there is an unconstitutional discrimination when annexations are approved by an electoral process from which annexed citizens are excluded, . . . , *there does not seem to be any basis for an equal protection claim when no one is granted the right to vote on the matter.* This leaves the plaintiffs the task of establishing a right to vote on annexations. However, there appears to be no statutory requirement and the Court fails to perceive such a right in the Constitution. . . .

(emphasis added).

The Court, citing *Hunter v. City of Pittsburgh, supra*, in support of its position that there is no statutory or constitutional right to vote on annexations, further said at page 76:

. . . Although this sweeping language is subject to some exceptions, e.g., *Gromilion v. Lightfoot, supra*, it continues to be the law that states retain a broad discretion in regulating the boundaries of their political subdivisions, and there is no absolute constitutional right of citizens to vote on such matters

(citations omitted).

It should be noted that the Virginia annexation statutes, Va. Code Ann. § 15.1-1032 *et seq.* (1973), as

amended (Supp. 1974),⁵ under scrutiny in the *Citizens Committee to Oppose Annexation v. City of Lynchberg, Virginia* case, *supra*, require that annexation by a city or town of adjacent area can only be accomplished through a judicial proceeding. In Mississippi this requirement must also be met to accomplish annexation. § 21-1-33 Miss. Code Ann. (1972).⁶

5 Relevant portions of Va. Code Ann. § 15.1-1041 read as follows:

§ 15.1-1041. Hearing and decision. — (a) The court shall hear the case upon the evidence introduced as evidence is introduced in civil cases.

(b) The Court shall determine the necessity for and expediency of annexation, considering the best interests of the county and the city or town, the best interests, services to be rendered and needs of the area proposed to be annexed, and the best interests of the remaining portion of the county

6 Section 21-1-33 Miss. Code Ann. (1972) reads:

If the chancellor finds from the evidence presented at such hearing that the proposed enlargement or contraction is reasonable and is required by the public convenience and necessity and, in the event of an enlargement of a municipality, that reasonable public and municipal services will be rendered in the annexed territory within a reasonable time, the chancellor shall enter a decree approving, ratifying and confirming the proposed enlargement or contraction, and describing the boundaries of the municipality as altered. In so doing the chancellor shall have the right and the power to modify the proposed enlargement or contraction by decreasing the territory to be included in or excluded from such municipality, as the case may be. If the chancellor shall find from the evidence that the proposed enlargement or contraction, as the case may be, is unreasonable and is not required by the public convenience and necessity, then he shall enter a decree denying such enlargement or contraction. In any event, the decree of the chancellor shall become effective after the passage of ten days from the date thereof or, in the event an appeal is taken therefrom, within ten days from the final determination of such appeal. In any proceeding under this section the burden shall be upon the municipal authorities to show that the proposed enlargement or contraction is reasonable.

The several cases cited by the Petitioners in support of their contention that Section 21-1-27 denies them equal protection as guaranteed by the Constitution, are the same type of "Fourteenth Amendment apportionment cases" relied upon by the plaintiffs in the *Citizens Committee to Oppose Annexation v. City of Lynchberg, Virginia* case, *supra*, and, therefore, do not deal directly with the proposition in point, i.e., the grant and exercise of the power to annex adjacent territory without the consent of the inhabitants therein. These specific cases deal with various and sundry points of law. The majority, however, of the cases relied upon by the Petitioners, i.e., *Reynolds v. Sims*, 377 U.S. 533 (1963), *Dunn v. Blumstein*, 405 U.S. 330 (1972), *City of Phoenix v. Koldziejski*, 399 U.S. 204 (1970); *Evans v. Korman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969), and *Kramer v. Union Free School District*, 395 U.S. 620 (1969), are orthodox voting rights cases. The fact that the Petitioners do not have a right to vote on the annexation of the proposed annexation area is not the result of an invidious or suspect classification or any other act of overt discrimination. The Petitioners can in no way, in this case, show that they have been deprived of any benefits that would be due them, because of some unreasonable or unjustified classification. This case is, therefore, not a proper case for the application of the compelling state interest test in *Dunn v. Blumstein*, *supra*, as urged by the Petitioners in their brief. See also, *Garren v. City of Winston-Salem, North Carolina*, 463 F.2d 54 (4th Cir. 1972); and, *People ex rel. v. Village of North Barrington*, 94 Ill.App.2d 265, 237 N.E.2d 350 (1968).

The Respondent would submit that the equal protection clause of the Fourteenth Amendment only requires that the inhabitants of the annexing area and of the area annexed have an equal opportunity to participate in the annexation process. Section 21-1-31 Miss. Code Ann. (1972) affords such an equal opportunity with the requirement of a judicial determination as to whether or not the annexation is reasonable. Opponents and proponents alike may come before the Court and be heard concerning the annexation's reasonableness. Neither group of inhabitants has been afforded the right to vote upon the annexation. There cannot, therefore, be a violation of the equal protection clause of the Fourteenth Amendment where such a situation exists.

Petitioners infer, but never expressly state that since § 21-1-13 Miss. Code Ann. (1972) (incorporation of municipalities) and § 21-1-45 Miss. Code Ann. (1972) (inclusion or exclusion of territory) require a petition signed by two-thirds of the qualified electors residing in the areas affected by the particular statutes, the absence of such a provision in § 21-1-27 denies the inhabitants of the area proposed for annexation equal protection of the law as required by the Constitution. These three statutes apply to separate and distinct processes. As pointed out by the Mississippi Supreme Court, "there is 'a fundamental difference of some magnitude' between incorporation of an unincorporated area on the one hand and the extension of corporate boundaries on the other. *Hamilton v. Incorporation of Petal*, 291 So.2d 190 (Miss. 1974)." (336 So.2d 490, 492). Further, there was no showing by the Petitioners that the legislature's omission of the requirement of the approval by vote, by petition or

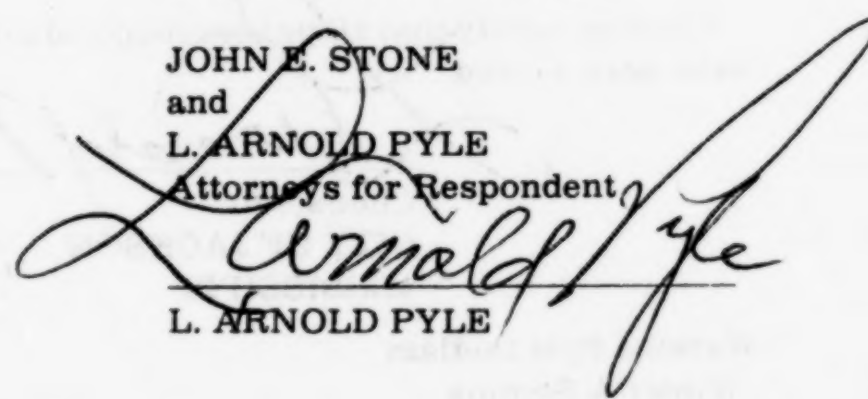
otherwise of the inhabitants of the area proposed for annexation was the result of some invidious or suspect classification or act of overt discrimination. It was the Mississippi Legislature that determined the manner in which adjacent unincorporated territory was to be annexed by municipalities. The Petitioners did not show, nor did they attempt to show, that the Legislature's determination was unreasonable and unjustified, or, that the State had used its power over municipal boundaries to circumvent a federally protected right. The Petitioners obviously may fashion a remedy to their "problem" in the form of new legislation. It is, however, submitted that the United States Constitution offers them no remedy.

CONCLUSION

Wherefore, for the foregoing reasons the Respondent most respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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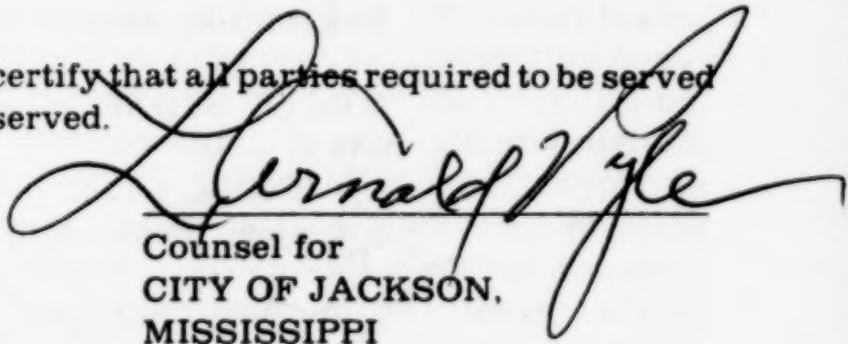
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 1976, copies of this Brief of Respondent in Opposition were mailed, postage prepaid, to the attorney for Petitioners, John Arthur Eaves, Eaves and Eaves, 101 Plaza Building, Jackson, Mississippi, 39201.

I further certify that all parties required to be served have been served.


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